The Virtues of "Value Clarity" in Constitutional Decisionmaking

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I. INTRODUCTION

"[C]onstitutional law, now and always, is about values."[1]

Traditional evaluations of the Supreme Court's constitutional opinions focus on whether it has satisfied norms of legal craftsmanship and observed its properly limited role as dictated by the precarious legitimacy of judicial review in our democracy. An important criterion too often overlooked or underemphasized is the clarity with which the Court expresses and justifies its preference for one value over another. By clearly articulating the value preference inherent in its decisions, the Court can perform an important democratic function: enhancing the ability of a focused electorate to understand, debate, and resolve the important issues of the day. Value clarity thus may help to reconcile the practice of judicial review with democratic values.

The first portion of this paper will review the various approaches which currently dominate the debate over the proper purpose and scope of judicial review, thereby providing context and contrast to the alternative advanced here. After explaining and applying the norm of value clarity, its importance to democratic governance in the United States will be defended. Finally, the conditions which limit the capacity of the Court to fulfill the goal of value clarity in constitutional decisionmaking will be explored.

II. CONTEMPORARY CONSTITUTIONAL THEORY

The central issue in normative constitutional scholarship remains what Alexander Bickel referred to as "the countermajoritarian difficulty":[2] the power of unelected, life-tenured Justices to "veto" the decisions of our elected representatives, subject to reversal only through constitutional amendment, possesses dubious legitimacy in a democracy.

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[1] Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989).

[2] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962).

Of course, most would agree that "the Constitution itself provides for countermajoritarian trumps, called 'rights,' that the Court may play in appropriate cases."[3] Although easing the tension between judicial review and the principle of majority rule in a general way, the task remains of determining precisely which rights do and do not count as legitimate trumps. Or, in Bickel's words, it remains to be determined "which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts. And how is the Court to evolve and apply them?"[4]

This question has produced a truly amazing array of responses.[5] For example, interpretivists regard as exclusively legitimate only those values expressly stated or clearly implied in the constitutional text.[6] Noninterpretivists would permit the Court to advance society's "fundamental values," variously defined, even if not clearly expressed in the Constitution.[7] Process-based theorists, such as John Hart Ely, respond that the Court should not choose and impose values at all; instead, it may legitimately intervene only to correct

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[3] Samuel Estreicher, *Platonic Guardians of Democracy*, 56 N.Y.U. L. REV. 547, 580 (1981).

[4] BICKEL, *supra* note 2, at 55.

[5] For my own contribution, see TERRI PERETTI, IN DEFENSE OF A POLITICAL COURT (forthcoming 1995).

[6] *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); ROBERT BORK, THE TEMPTING OF AMERICA (1990); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? (1991); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973); Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (originating the interpretivist-noninterpretivist distinction); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981).

[7] While united in their willingness to allow the Court to go beyond the text, noninterpretivists vary greatly with regard to which "fundamental values" the Court should apply. However, equality and personal autonomy seem to be the most popular. For a sampling of this approach, see generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Michael J. Perry, *Abortion, the Public Morals, and the Police Power*, 23 UCLA L. REV. 689 (1976). For a libertarian noninterpretivist approach, see STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1986).

malfunctions in the democratic process.[8]

Yet another group of scholars is largely indifferent to the question of which values the Court may legitimately assert in opposition to majority desires. Proponents of "provisional review," such as Michael Perry and Paul Dimond, argue that as long as the Court's judgments are provisional, subject as an empirical matter to political response and revision, the conflict between judicial review and democratic values is ameliorated.[9]

Similarly, political scientists regard the countermajoritarian difficulty as greatly exaggerated.[10] Given that the United States' political system is rife with obstacles to majority rule, it is nonsensical to demand of the Court some exceptional justification for its similar deviance from the principle of majority rule. Thus, the need for a theory by which constitutional values can be derived in some objective, coherent manner in order to render the Court's countermajoritarian character acceptable is nonexistent, resting on a fundamental misunderstanding of how American politics actually operates.

For Critical Legal Studies scholars, the search for such a theory is in any case doomed to failure, due to the inherently indeterminate nature of all forms of interpretation and the contradictions of the liberal tenets upon which constitutional theory rests.[11] Accordingly, judicial power cannot be objectively

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[8] JOHN H. ELY, DEMOCRACY AND DISTRUST (1980). For other process-based theories, see LOUIS LUSKY, BY WHAT RIGHT? (1975); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970). Guido Calabresi provides an approach which combines noninterpretivism and process-oriented review. *See* Guido Calabresi, *The Supreme Court 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

[9] PAUL R. DIMOND, THE SUPREME COURT AND JUDICIAL CHOICE (1989); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); *see also* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984); Calabresi, *supra* note 8; Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9 (1985); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

[10] *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); PERETTI, *supra* note 5, at chs. 6–7; MARTIN SHAPIRO, FREEDOM OF SPEECH, THE SUPREME COURT AND JUDICIAL REVIEW (1966); *see also* Chemerinsky, *supra* note 1, at 74–83.

[11] Given the lack of consensus among scholars in this field (to state it mildly), the critics certainly have considerable "empirical" evidence on their side. For a sampling of this extensive literature, see LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL

and coherently constrained and, thus, remains arbitrary and illegitimate.

The final approach, although admittedly overlapping many of the others, is the legal process school.[12] Rather than emphasizing the "correctness" of any particular value choice made by the Court, these theorists regard the *process* or methodology of legal decisionmaking as centrally important in reducing the tension between judicial power and democratic rule. Thus, judges should carefully articulate the reasons supporting their decisions, speaking in terms of general principles which are persuasively derived from text and precedent and which transcend the immediate case. Focusing on process insures that the development and application of constitutional doctrine will be principled rather than ad hoc and arbitrary. The central notion which the legal process school advances is that as long as judges obey the conditions attached to their privilege as nonelective, life-tenured officials—to behave like judges and not like legislators—the potential for abuse of power is vastly reduced. Adherence to text and precedent and the requirement of principled, well-reasoned opinions minimizes the opportunity for the arbitrary and illegitimate imposition of a judge's personal values.[13]

It is certainly difficult to argue with the legal process scholar's preference for constitutional opinions which are clear, well-written, logical, coherent, and persuasively placed in the context of precedent. However, the emphasis on

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LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS (Richard A. Brody et al. eds., 1985); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); *Critical Legal Studies Symposium*, 36 STAN. L. REV. (1984); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

[12] *See generally* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833 (1991); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For an excellent application, see Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980).

[13] I argue that, in fact, the Justices' personal values are a legitimate and democratically defensible source of constitutional decisionmaking. *See* PERETTI, *supra* note 5.

process too often results in a denial of or indifference to the need for the Court inevitably to make choices between competing values. In other words, it may produce a false sense of security, that *being* principled somehow gets the Court out of the business of choosing the values about which to be principled.

Additionally, attention to traditional norms of judicial craft requires that our evaluation focuses inward, to the internal logic and coherence of the Court's opinions. While a matter of legitimate inquiry, we consequently overlook the equally important issue of how the Court's opinions affect the quality of the public debate which ensues.

To the degree that the Court is clear and certain in articulating the value preferences underlying its decisions, it can contribute a focus and energy to that debate. Thus, the aim of our concern with legal method should not be merely the limiting of discretion per se as the key to easing the tension between judicial power and democratic principles. Rather, that tension can be eased as well by an equally strong concern with value clarity in opinion writing and its consequences for the democratic resolution of the difficult issues facing the nation.

III. DEFINING AND APPLYING THE "VALUE CLARITY" NORM

It may prove useful in explaining what value clarity is by first discussing what it is not. Value clarity does not simply mean "truth in judging," which some scholars and Justices advocate.[14] I am not imploring the Justices to be more honest with regard to the "true" bases of their decisions—to state in a simple and forthright manner that in their view a certain policy is beneficial to society, rather than pretending their decision is dictated by text or precedent. Nor am I asserting that it makes *no* difference which values the Court chooses to advance or that we cannot distinguish between the relative persuasiveness or authoritativeness of one choice compared to another. Rather, I am suggesting that we separate the terribly difficult (and some would say unresolvable) issue of *which* values the Court may legitimately impose, the dominant concern of conventional constitutional theorists, from the important issue of how the Court should go about articulating and defending its value choices.

The Court in its opinions should be clear with regard to the overriding value it is choosing to advance and protect, whether economic liberty or political equality or sexual autonomy. That is true irrespective of the identified

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[14] *See* Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Alpheus T. Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385 (1962); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

source of that value. The Court should tell us precisely which value is being advanced and why that value is so important.

The Court is also obligated to inform us which competing values are consequently at risk and why they must lose out. Adopting Stephen Macedo's formulation, the Court "must be prepared not merely to assert" its value preference, it must also justify that preference "to dissenting citizens."[15] Thus, the majority in *Bowers v. Hardwick*[16] was required to provide to Michael Hardwick and others engaging in the prohibited act of sodomy, clear and persuasive reasons why the right of the majority to condemn and punish sodomy is more important than the right of the individual to make choices regarding private, consensual sexual activity free from governmental intrusion.

Evaluating Supreme Court opinions according to their value clarity is necessarily a subjective endeavor.[17] However, there is little doubt where we must place *Roe v. Wade*.[18] It is an exceptionally strong candidate for the "unclear" category.[19] As aptly stated by Mark Tushnet, Justice Blackmun's "innovation" in *Roe* was "the totally unreasoned judicial opinion."[20]

In his majority opinion, Blackmun reviewed (in painful detail) ancient

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[15] MACEDO, *supra* note 7, at 61.

[16] 478 U.S. 186 (1986). In *Bowers*, the Court upheld, in a five to four vote, a Georgia statute which criminalized sodomy and provided for up to twenty years imprisonment.

[17] Given the nature of our roles as constitutional law scholars and critics, there is a tendency, if not an imperative, to find all opinions wanting in some regard or another. Ely has argued that this tendency, the habit of "crying wolf," weakens our capacity to recognize a truly terrible and dangerous decision, *Roe v. Wade* being the prime example. 410 U.S. 113 (1973); *see* John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[18] 410 U.S. 113 (1973).

[19] The volume of scholarly criticism of *Roe* has been extraordinary. For a small sampling, see Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978 (1981); Ely, *supra* note 17; Epstein, *supra* note 6; Grano, *supra* note 6; Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45 (Jay L. Garfield & Patricia Hennessey eds., 1984); John T. Noonan, Jr., *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668 (1984); Michael J. Perry, *Substantive Due Process Revisited*, 71 NW. U. L. REV. 417 (1976).

[20] TUSHNET, *supra* note 11, at 54. In fairness to Blackmun, we should acknowledge that he did not have much with which to start. After all, Justice Douglas based the right to privacy in *Griswold v. Connecticut* on the existence of "penumbras, formed by emanations" from the guarantees of the Bill of Rights. 381 U.S. 479, 484 (1965).

attitudes toward abortion, the Hippocratic Oath forbidding abortion, and the development of legal restrictions on abortion in common law and English and American statutory law.[21] He additionally described the views of the American Medical Association, the American Public Health Association, and the American Bar Association.[22] At last we get to Blackmun's constitutional analysis, in which he briefly discusses the doctrinal mess known as "right of privacy,"[23] to which he blithely tacks on a woman's right to choose abortion. Blackmun even provides us with a choice with regard to the textual source for this right—either the Fourteenth Amendment's due process restrictions on liberty, the majority's preference, or the Ninth Amendment, preferred by the district court in *Roe*.[24] Apparently, either will suffice. Blackmun then divides the pregnancy into trimesters, based on medical developments concerning maternal health and safety and fetal viability, varying the level of judicial scrutiny accordingly.[25] The competing interest of the state in protecting potential life is largely dismissed, due to the lack of consensus regarding when life begins and whether the fetus is a person.[26] We are then told at the opinion's end that "the abortion decision . . . is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[27]

In sharp contrast to his muddled opinion in *Roe* is Blackmun's dissent in the *Bowers* case.[28] Here, his constitutional argument regarding the right of

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[21] *Roe*, 410 U.S. at 130–41.

[22] *Id.* at 141–47.

[23] *Id.* at 152–55.

[24] *Id.* The Ninth Amendment to the U.S. Constitution provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Court has been quite reluctant to accept this broad invitation to elaborate other nonenumerated rights.

[25] *Roe*, 410 U.S. at 155–56.

[26] *Id.* at 157–59.

[27] *Id.* at 166. For a critique of this emphasis on the physician's rather than woman's choice, see Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization*, 6 HARV. WOMEN'S L.J. 51 (1983).

[28] Bowers v. Hardwick, 478 U.S. 186 (1986). It is certainly easier to write a clear and principled dissenting opinion than a clear and principled majority opinion, given the need for compromise in order to obtain the support of additional Justices. If the account of the writing of the *Roe* opinion in *The Brethren* is correct, the six Justices joining Blackmun's majority opinion did in fact demand significant changes. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 271–80 (Avon Books 1981) (1979). Nonetheless, three Justices did endorse Blackmun's reasoning in *Bowers* by joining his dissent (Brennan, Marshall, and Stevens). Collegiality as a limitation on achieving value clarity in opinion writing is discussed *infra* Part VI.A.

privacy is developed more fully and coherently. For example, he organizes the Court's previous right of privacy decisions into two "distinct, albeit complementary" areas.[29] First are those rulings which "recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make,"[30] such as a woman's decision whether to abort and parental decisions concerning childrearing and education. Second are those decisions which have "recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged."[31]

The Georgia sodomy statute, argues Blackmun, "implicates both the decisional and the spatial aspects of the right to privacy."[32] Criminalizing sodomy intrudes upon decisions regarding "sexual intimacy . . . a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,"[33] and in which "the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[34] Additionally, the sexual act for which Hardwick was arrested "occurred in his own home, a place to which the Fourth Amendment attaches special significance,"[35] and thus represents not simply governmental invasion of a physical place, but "the invasion of his indefeasible right of personal security, personal liberty and private property."[36]

Blackmun not only brings a clarity and much-needed coherence to the right of privacy decisions, but he also more clearly and crisply states the competing interests at stake, and directly addresses and rebuts the opposing views expressed in the majority's opinion, again a significant departure from his *Roe* opinion. Thus, Georgia asserts (and the Court majority accepts) its "right to maintain a decent society," and to condemn sexual acts which "for hundreds of years, if not thousands, have been uniformly condemned as immoral" and which violate "traditional Judeo-Christian values."[37] However, Blackmun argues that the majority's view of private morality cannot prevail simply because of conformity to religious doctrine or because of the intensity with which or the length of time such a view has been held.[38] In any case, whatever

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[29] *Bowers*, 478 U.S. at 203–04 (Blackmun, J., dissenting).
[30] *Id.* at 204.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 205 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).
[34] *Id.* at 205.
[35] *Id.* at 206.
[36] *Id.*
[37] *Id.* at 210–11.
[38] *Id.* at 211–12.

harm is inflicted on those citizens due to their "knowledge that other individuals do not adhere to one's value system,"[39] (and Blackmun does not regard such harm as "real" or substantial), it is surely insufficient, he argues, to "justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."[40] Thus, Blackmun argues that the majority's right to condemn and punish conduct it regards as immoral is far outweighed by the fundamental right of individuals to make choices regarding sexual intimacy: "[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[41] Although some may disagree with the weight Blackmun places on each of the competing values, he has far more clearly and coherently elaborated and justified the right of privacy and the inclusion of homosexual sodomy within that general right.

More important than the clarity with which the Court expresses its value judgments in individual opinions is the clarity of the general doctrines and constitutional themes which the Court pursues, or what might be referred to as "thematic clarity." Thus, we may criticize the Court during the *Lochner* era[42] for the unpersuasive manner in which it interpreted the Due Process Clause as a nearly absolute bar to state economic regulation. We may additionally have grave doubts regarding the Court's legitimacy and competence to play such a significant role in economic policymaking. We may further simply regard the Court's decisions as unwise from a public policy standpoint. However, we cannot fault the *Lochner* Court with regard to the clarity of purpose of its constitutional pursuits: the vigorous protection of economic liberties from governmental interference.

Similarly, the Warren Court was often criticized for its failure to adhere to professional norms of legal reasoning and craftsmanship.[43] However, that

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[39] *Id.* at 213.

[40] *Id.*

[41] *Id.* at 214.

[42] Lochner v. New York, 198 U.S. 45 (1905). The *Lochner* era refers to the approximately 30-year period in which the Court employed a narrow interpretation of the Commerce Clause and an expansive interpretation of the Fourteenth Amendment's Due Process Clause in order to place a roadblock in the way of efforts by both the federal and state governments to regulate the economy. In *Lochner*, the Court struck down a New York statute setting maximum work hours for bakers. The Court ruled that the regulation unreasonably restricted the bakers' liberty of contract, the freedom to contract with employers to work as many hours as they might wish. In the latter years of this era of vigorous protection of economic rights and laissez faire, the Court struck down numerous New Deal programs.

[43] *See generally* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT

Court would receive high marks for the clarity and consistency of its constitutional endeavor: to combat inequality, particularly with regard to race, voting rights, and the criminal justice process.

To praise both the *Lochner* Court and the Warren Court is likely to strike many readers as unusual, if not bizarre. However, that unconventional pairing is sensible in light of the thematic clarity of each Court's constitutional decisions and, accordingly, in light of the positive contribution each made to the quality of the public debate which ensued. Before proceeding further in the application and, thus, the clarification of this criterion, it will prove helpful to explain more precisely the benefits of value clarity.

IV. THE VIRTUES OF VALUE CLARITY

The requirement that the Court's opinions be principled and firmly rooted in text and precedent is intended, first, to minimize judicial discretion and the arbitrary imposition of a Justice's personal views[44] and, second, to promote certainty and stability in the law. However, as Richard Saphire cogently argues, the obsession with the processes and methodologies of interpretation has led scholars to proceed too cautiously and to perceive the value of interpretive theories in negative terms:

> If the judicial process could not be purged completely of discretion . . . it could not be justified. As thus conceived, the animating purpose of constitutional theory has been to neutralize Constitutional doctrine of its moral content by restraining the range of judicial choices that could be regarded as legitimate. The success of its practitioners has been measured not so much by their ability to delineate the range and depth of values properly invocable in Constitutional argument, but by their ability to point to those that are not.[45]

Clarity in expressing the Court's value choices, on the other hand, is intended to serve democratic ends in a positive way. Its aim is to invigorate and enrich public debate, rather than merely to minimize the opportunity for judicial intervention and prevent abuse of power. This function of focusing the nation's attention on the constitutional dimensions of current political issues and

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(1965); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); Hart, *supra* note 12.

[44] As noted previously, I reject the conventional view that "value voting" by Justices is arbitrary. I argue it is legitimate and democratic. *See* PERETTI, *supra* note 5.

[45] Richard B. Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335, 344 (1981).

conflicts serves democratic ends generally and is directed more particularly to a number of problems unique to American democracy.

In *The Responsible Electorate*, V. O. Key argued that:

> The voice of the people is but an echo chamber. The output of an echo chamber bears an inevitable and invariable relation to the input. As candidates and parties clamor for attention and vie for popular support, the people's verdict can be no more than a selective reflection from among the alternatives and outlooks presented to them.[46]

As Key notes, there are inherent limitations on the ability of the people to communicate a meaningful and coherent set of policy instructions to the government. For example, in elections, the vocabulary of the people is largely restricted to two words—"yes" and "no." They may vote for one candidate and his or her set of policies or for another. A high premium is thus placed on the quality of the choices given to voters. To the degree that the people are given a clear, coherent, and meaningful choice regarding competing policies, their simple yes or no response has meaning. That choice is what permits them to have a meaningful measure of control over government policy.

In short, the people are largely restricted to *reacting*, and must be given something meaningful to which to react. This responsibility for putting before the people meaningful policy initiatives is shared by many political leaders, *including* Supreme Court Justices. It is in this way that value clarity in Supreme Court opinions serves democratic ends.

However, in the United States there are additional and unusual obstacles to the ability of government leaders to ascertain and then carry out the people's desires, making the Court's contribution especially valuable. First, a clear and certain consensus is far from realized privately, due to the size and diversity of the population. Majority formation and expression are made more difficult by the absence of policy-preference groupings which are coherent and relatively enduring.

Of course, the inability of a consensus to emerge privately is precisely why we create political institutions. However, the task for American political institutions is a more daunting one than usual. Additionally, United States political institutions are not well-designed or structured so as to ascertain and respond to majority desires effectively.[47]

Political parties in the United States, for example, have traditionally been weak and highly decentralized organizations; additionally, they have grown

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[46] V.O. KEY, JR., THE RESPONSIBLE ELECTORATE 2 (1966).

[47] Of course, this structure is often quite intentional. *See* THE FEDERALIST No. 10 (James Madison).

weaker in the last few decades.[48] Consequently, parties have only a limited capacity for organizing that morass of preferences into coherent and comprehensive policy packages and for enforcing adherence to that platform by all of the party's candidates. In other words, a clear consensus does not exist in a natural state *or* as a result of a majority's identification with a political party. In addition, voter attachment to one of the two major political parties has weakened in the last thirty years. Fewer Americans identify themselves as Democrats or Republicans, and more Americans regard the two parties in negative terms or as irrelevant.[49] Especially important, split-ticket voting has increased, resulting in more ambiguous and mixed messages being sent to government leaders. Divided party control and interbranch stalemate are the frequent and unsurprising result.[50]

Finally, our elections are not structured in such a way as to facilitate the expression of majority preferences in a clear, specific, and comprehensive manner. The President and the members of the House and Senate are elected independently of each other, by different constituencies, and for different terms of office. As a result, voters do not simultaneously elect a cohesive national leadership and are hindered in transmitting an unequivocal policy message.

Given the size and diversity of the United States and the weaknesses in the mobilizing and organizing capacities of its party and electoral mechanisms, the task of building and sustaining a consensus for specific government policies rests upon our governing institutions.[51] However, because of the diversity in how those various institutions are composed and structured, each has its own, often different, view regarding where that consensus lies.

Competition among those diverse institutions is expected to produce a broader, more inclusive consensus. However, the road to that desired end is a bumpy one. In the interim (which is to say, most of the time), there is great noise and confusion over how a variety of issues are to be resolved.

One implication might be to require that the Court stay out of the policymaking process as much as possible, thereby not adding to the noise.

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[48] *See generally* WILLIAM J. CROTTY, AMERICAN PARTIES IN DECLINE (1984); PARTY RENEWAL IN AMERICA (Gerald M. Pomper ed., 1980); NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM (1983); FRANK J. SORAUF & PAUL A. BECK, PARTY POLITICS IN AMERICA (6th ed. 1988); MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952–1988 (1990).

[49] *See* WATTENBERG, *supra* note 48; Helmut Norpoth & Jerrold Rusk, *Partisan Dealignment in the American Electorate: Itemizing the Deductions Since 1964*, 76 AM. POL. SCI. REV. 522 (1982).

[50] BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA (1990).

[51] Nelson W. Polsby, *Legislatures*, *in* HANDBOOK OF POLITICAL SCIENCE (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

However, the Court has more to offer than simply "more of the same" policy advice. Its unique status as a nonelective institution enables the Court to make a similarly unique contribution to the consensus-building process. Although too much is often made of it, the Court has greater political freedom to protect values and groups given short shrift in other branches. The Rehnquist Court is certainly proof that there is no guarantee that minority rights and freedoms will be vigorously protected.[52] Nonetheless, the Court remains an alternative institutional site for reconsideration of government policy in light of constitutionally guaranteed rights. As an example, although the Rehnquist Court has usually been quite conservative, mostly in the form of deference to the government (especially the executive branch), it has been quite reluctant to allow governmental restrictions on free speech.[53]

The need for political leadership—providing the people something clear and meaningful to which to react—is especially important in the United States. Without leaders engaging us in a clear, value-focused debate, a political consensus cannot emerge due to the great ambiguity and complexity of policy preferences and the weaknesses of our party and electoral mechanisms in mobilizing and organizing them.

By dealing with value conflicts in a clear and forthright manner, the Court can add a focus and energy to public debate, thereby facilitating a dialogue on and a political response to the issues of the day. For example, the conservative *Lochner* era Court clearly and consistently ruled that economic liberty was a constitutional trump of great importance and power. Furthermore, the conservative Court majority in the 1930s invalidated a variety of New Deal programs in a relatively short period of time. In doing so, it subjected the emerging New Deal consensus to a clear and important constitutional critique, permitting the people to re-evaluate and then overwhelmingly refute the old consensus and definitively sanction a new one.[54]

Similarly, the Warren Court pursued the goal of economic and political equality on a variety of fronts. In doing so, it put to a clear test the commitment of the American people and their elected representatives to

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[52] For an excellent journalistic account, see DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992). *See also* Chemerinsky, *supra* note 1; Robin West, *The Supreme Court 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

[53] The best example of this reluctance is the Court's refusal to uphold flag desecration statutes. U.S. v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). Justices Scalia and Kennedy provided the key votes in transforming the usual liberal trio of dissenters (Brennan, Marshall, and Blackmun) into a majority.

[54] Ackerman provides a similar account of the Court's positive contribution during this time, in BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

equality as an *overriding* value in public policy, thus leading to a more definitive consensus on that issue.

In recent years, the increasingly conservative Rehnquist Court appeared to be testing the people in a similar manner, but for a new and quite different value—tradition or traditional morality. This value preference is clearly foreshadowed in *Bowers*, the last case in which Chief Justice Burger wrote an opinion.[55] In deciding whether to include homosexual sodomy among the liberties protected by the Fourteenth Amendment, the Court asked whether such conduct is "deeply rooted in this Nation's history and tradition."[56] It found such a claim "facetious"[57] because "[p]roscriptions against [homosexual sodomy] have ancient roots."[58]

Among the examples of the Rehnquist Court's invocation of tradition as an important interpretive source, one case stands out—*Michael H. v. Gerald D.*[59] In this 1989 case, five Justices rejected the claims of a natural father to paternity and visitation rights over the daughter he conceived in an adulterous affair. In his plurality opinion, Justice Scalia addressed the question of how to avoid the illegitimate imposition of the Justices' personal values in deciding which Fourteenth Amendment liberties are so fundamental as to justify strict judicial scrutiny. Scalia's answer was tradition: "[T]he interest denominated as a 'liberty'" must "be an interest traditionally protected by our society"[60] and "so rooted in the traditions and conscience of our people to be ranked as fundamental."[61] In what became a much-discussed footnote, Scalia (joined only by Rehnquist) further argued that the relevant tradition should be defined at the most specific level of generality: because "general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. . . . [I]f arbitrary decisionmaking is to be avoided, [we must] adopt the most specific tradition as the point of reference."[62] Thus, the

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[55] Bowers v. Hardwick, 478 U.S. 186 (1986).

[56] *Id.* at 194.

[57] *Id.*

[58] *Id.* at 192.

[59] 491 U.S. 110 (1989).

[60] *Id.* at 122.

[61] *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[62] *Id.* at 127–28 n.6. For commentary regarding Scalia's opinion, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); Bruce Ackerman, *Liberating Abstraction*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 317 (Geoffrey R. Stone et al. eds., 1992); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990); Chemerinsky, *supra* note 1, at 56, 94–95. Frank H. Easterbrook, *Abstraction and Authority*, *in* THE BILL OF RIGHTS IN THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992). Regarding the "level of abstraction" problem more generally, see DWORKIN, *supra* note 7, at 134–

question for Scalia became whether society has traditionally accorded special respect and protection to a father whose child was "born into a woman's existing marriage with another man."[63] The obvious answer was "no."

In his strongly-worded dissent, Justice Brennan attacked Scalia's "interpretive method" as "misguided."[64] He argued that such an approach fails to recognize that our society is a "facilitative, pluralistic one,"[65] and that the Constitution protects more liberties than those given "specific approval from history."[66] For Brennan, the more appropriate question was "whether *parenthood* is an interest that historically has received our attention and protection."[67] The answer, like the answer to Scalia's question, was "too clear for dispute."[68]

Just as the old conservative Court of the early 1930s tested our commitment to the New Deal, and the Warren Court tested our commitment to the goal of equality, the Rehnquist Court appears to be testing our nation's commitment to traditional morality, our tolerance for intolerance. To the degree that it advances that value, clearly and singularly, in a variety of case contexts, the Rehnquist Court qualifies as a "good" Court. It is the clarity and consistency of its reverence for tradition which permits, indeed invites, a political reaction.[69]

The many scholars who decry the Rehnquist Court's frequent rejection of constitutional claims in favor of deference to governmental authority are unlikely to agree with this positive evaluation. However, I am not endorsing the Rehnquist Court's substantive value choices; rather, I am endorsing, from the standpoint of democratic values, its attempt to develop a clear constitutional theme, to which the public and political leaders can react. Before constitutional values and ideals can be deeply accepted, they must first be clearly stated. Thus, value clarity helps to fulfill the proper commitment to the Constitution as an ultimately democratic document.

36; Brest, *supra* note 11.

[63] *Michael H.*, 491 U.S. at 125.

[64] *Id.* at 140 (Brennan, J., dissenting).

[65] *Id.* at 141.

[66] *Id.*

[67] *Id.* at 139 (emphasis added).

[68] *Id.* This dispute regarding the appropriate level of generality was present as well in *Bowers*. The Justices disagreed over whether the case involved a fundamental right to engage in homosexual sodomy, the right of consenting adults to make intimate choices regarding sexual activity, or more generally yet, the right to be left alone.

[69] However, Chemerinsky argues that the Rehnquist Court, and Scalia in particular, has been inconsistent in its adherence to tradition as an interpretive source. Chemerinsky, *supra* note 1.

V. A RESPONSE TO PROFESSOR ACKERMAN

Bruce Ackerman similarly believes that the Court, through the clarity and force of its decisions, can strengthen the democratic process and enhance the capacity of the people to address and resolve constitutional issues.[70] For example, he argues that the vigorous defense of economic liberties by the conservative anti-New Deal Court

> helped, not hurt, the democratic process through which the People gave new marching orders to their government in the 1930's. By dramatizing the fundamental constitutional principles raised by the New Deal, the Old Court contributed to a more focused, and democratic, transformation of constitutional identity than might otherwise have occurred.[71]

Although he correctly regards this "focusing" role as beneficial to democratic governance, Ackerman would permit the Court to exercise it, and the people to benefit from it, only under highly unusual circumstances. The general role which Ackerman assigns to the Court is "preservationist"—the protection of *existing* constitutional principles from change wrought by ordinary legislative or executive action.[72] Through its resistance to statutory attempts to alter the Constitution, the Court first signals to the people that constitutional change is being contemplated and requires their attention. It then translates or re-casts those statutory reform activities in constitutional terms; it forces the reformers to shape and defend their goals in terms of a more clear and certain constitutional debate. The Court, thus, helps to create a rare event: a "constitutional moment," in which an unusually attentive, focused, and mobilized citizenry is called upon to accept or reject a proposed constitutional change. We the people are invited to endorse fundamental constitutional change, either through a formal amendment or a series of significant electoral victories, such as occurred in the New Deal era.[73]

The problem with Ackerman's view is that the Court's focusing and energizing role is limited, reactive, and episodic. He gives to the Court the single task of "preserving existing constitutional principles." Of course, this

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[70] ACKERMAN, *supra* note 54, at 104. Similarly, Goldstein argues that Supreme Court Justices "have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—something that We the People of the United States can understand." JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 19 (1992).

[71] ACKERMAN, *supra* note 54, at 104.

[72] *Id.* at 10.

[73] For example, Ackerman regards the Senate's rejection of the Bork nomination as a "failed constitutional moment." *Id.* at 51.

view erroneously assumes that such principles are knowable and widely accepted. Ackerman additionally believes that the Court has played its signaling and focusing role in a significant way only twice in America's history—in the Civil War and New Deal eras. To view the history of constitutional change in the United States as consisting almost entirely of "statutory valleys" and only a few "constitutional peaks" cannot be taken seriously. It fails to recognize constitutional change as an ongoing process.[74]

Ackerman, thus, belittles the Court's role in the ongoing process of constitutional change. The Court does not, and need not, merely protect a previously-reached constitutional consensus from statutory alteration until that rare moment when it is decisively rejected by the people. The Court additionally can, does, and should play an active and critical leadership role in the continual process of political and constitutional change.

The Warren Court, for example, certainly went beyond Ackerman's assigned role of defending traditional, consensual constitutional principles. The clarity and uniformity of purpose characterizing its egalitarian pursuits represent precisely the type of political leadership which helps democracy to work, especially in a large, heterogeneous, and structurally-fragmented system like that in the United States. The Warren Court helped to provoke a heated and focused public debate and thereby enhanced the ability of the people to have a significant say over the critical political and constitutional issue of equality. Certainly its egalitarian goals were not fully realized, most notably with regard to public education, which is still marked by both racial segregation and substantial inequality in funding. However, "success" is defined here not in terms of having the Court's policy preferences ultimately prevail, but in helping the people themselves to arrive at a consensus. This definition explains how the *Lochner* Court can be praised as well. That Court lost the battle, but "we the people" won the war. The Court's failures can, thus, often be regarded as democratic successes.

VI. VALUE CLARITY AND JUDICIAL CAPACITY

The critical question which remains is whether value clarity in constitutional decisionmaking is a reasonable goal and not merely a desirable

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[74] For several reviews of Ackerman's theory which provide similar criticisms, see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMM. 115 (1994); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's* WE THE PEOPLE, 9 CONST. COMM. 309 (1992); Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187 (1992); Christy Scott, *Constitutional Moments and Crockpot Revolutions*, 25 CONN. L. REV. 967 (1993); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992).

one. In fact, there are serious limitations on the capacity of the Court to attend, strongly and consistently, to the norm of value clarity. What are these limitations and how might they be overcome or at least ameliorated?

A. *Collegiality*

One significant limitation on the Court's ability to adhere consistently to the norm of value clarity in opinion writing is the fact that constitutional decisionmaking is collegial in nature. Attaining agreement among at least five strong-willed individuals is no easy task. Negotiation and compromise regarding specific doctrinal choices, characterizations of relevant precedents, and the precise language to be employed often weaken the clarity and coherence of the resulting opinion. The instruction to lower federal courts in *Brown v. Board of Education*[75] to proceed with "all deliberate speed" is a perfect example. Thus, wise politics on the Court, as in other institutions, may require fudging the value conflicts in the service of other goals, such as consensus building within the Court. Nonetheless, when the Court pursues a new policy course, it should not and cannot expect to build substantial and long-term support for that policy by hiding behind unclear, unpersuasive, or false grounds, as in *Roe v. Wade*.

B. *Court Divisiveness*

Adding to the difficulty of achieving agreement on a clearly and precisely worded opinion is the not uncommon occurrence of strong ideological divisions within the Court. Some degree of disagreement on the Court may be helpful in terms of challenging the dominant constitutional philosophy and requiring the majority to defend its views more fully and carefully. However, severe and, *particularly*, complex philosophical differences can make the goal of value clarity virtually impossible.[76] That is especially true when leadership on the Court is weak or absent. The Burger Court is a perfect example. The ideological divisions on that Court, the lack of leadership by Chief Justice Burger, and the personal animosity toward him all contributed to the frequency of plurality opinions and individual opinions.[77] These factors may also explain

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[75] 349 U.S. 294, 301 (1955).

[76] *See* CHRISTOPHER E. SMITH, POLITICS IN CONSTITUTIONAL LAW: CASES AND QUESTIONS 155-68 (1992).

[77] *See, e.g.*, WOODWARD & ARMSTRONG, *supra* note 28. The *Furman v. Georgia* death penalty decision, consisting of nine separate opinions, is one of the better examples. 408 U.S. 238 (1972). The Burger Court's affirmative action decisions provide other examples. Fullilove v. Klutznick, 448 U.S. 448 (1980); University of Cal. v. Bakke, 438

the Burger Court's propensity for balancing approaches over the Warren Court's style of establishing general values and principles.[78] The consequence of personal and political divisiveness on the Court, from the value clarity perspective, is a reduced capacity to understand that Court, to "label" it and, thus, to be capable of responding to its general constitutional course. As a result, it is quite difficult for such a Court to build the necessary political support for any new constitutional endeavor.

One possible implication is that a Court which is ideologically homogeneous or "unbalanced" can be expected to do the best work, at least in terms of being clear and consistent with regard to its constitutional policy course. This conclusion runs directly contrary to Laurence Tribe's argument in favor of ideological balance on the Court and his corresponding advice to the Senate to use its confirmation role to achieve that end.[79]

Yet another implication for judicial selection is the importance of leadership within the Court, particularly by the Chief Justice. Political and social leadership skills can be used to forge a majority consensus around a general principle or policy goal and to overcome ideological and personal differences, thereby serving the end of value clarity. What is critical is the ability of at least a strong faction on the Court to organize around its preferred value and to articulate it clearly and effectively. For example, that was the case with the Court in the 1930s; despite its many five to four decisions, the value-orientation of each faction was strongly and clearly expressed.

C. *Value Clarity and Public Opinion*

There is yet another significant limitation on the ability of the Court to facilitate public debate through value clarity in opinion writing: the Court does not control how its decisions are communicated, nor can it always count on the public to be attentive to its rulings. Thus, value clarity may not have its desired effect.

The Court's rulings reach the public indirectly, through other actors such as the media, other political leaders, and the legal profession. It is, thus, dependent on the ability and desire of others to communicate its decisions clearly and effectively.

The problem with the media begins with the fact that coverage of the Court

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U.S. 265 (1978).

[78] Martin Shapiro, *The Supreme Court: From Warren to Burger*, *in* THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 2d ed. 1990).

[79] LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 106-24 (1985).

is neither in-depth nor continuous.[80] Additionally, stories tend to focus on the sensational. Finally, the training and expertise of journalists covering the Court have only recently improved.[81] Thus, the Court can speak in the clearest of terms regarding the values it is advancing, but it comes to nothing if that decision or line of cases fails to attract the attention of the media or is poorly covered.

The Court is also dependent on lower court judges, elected officials, and legal professionals to interpret and communicate its decisions. They will do so in accordance with their own interests, thereby independently shaping the ensuing debate as well.

There are several strategies available to the Court for overcoming these obstacles. Members might, for example, "go public." They can give speeches or interviews and address the public directly, particularly for those policies about which they care deeply. For example, Chief Justice Earl Warren took great care in writing the *Brown* opinion to insure that it could be printed in full in the nation's newspapers and would thus be directly accessible to the public (or at least the "attentive" public);[82] it was a short opinion which was written in simpler, less legalistic language than is typical. At least until recently, the Justices were quite typically former politicians and, therefore, possessed the political acumen and skills necessary to anticipate the likely reaction of, and shape their opinions in light of, the external political environment.[83]

A more radical approach to enhancing the effectiveness of the Court in reaching and persuading the public would be to employ the modern tools commonly used by others: a press office and a staff of media consultants. The thought of a media consultant, accustomed to devising a 30-second hit jpiece along the lines of former President Bush's Willie Horton ads, aiding the Court in its efforts no doubt seems bizarre and horrifying to most. Yet, the Court

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[80] *See generally* DAVID L. GREY, THE SUPREME COURT AND THE NEWS MEDIA (1968); GERALD N. ROSENBERG, THE HOLLOW HOPE 111–16, 229–34 (1991); Ethan Katsh, *The Supreme Court Beat: How Television Covers the U.S. Supreme Court*, 67 JUDICATURE 6 (1983); Chester A. Newland, *Press Coverage of the United States Supreme Court*, 17 W. POL. Q. 15 (1964); David Shaw, *Media Coverage of the Courts: Improving but Still Not Adequate*, 65 JUDICATURE 18 (1981); Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21 (1993).

[81] ROSENBERG, *supra* note 80, at 112.

[82] Warren described this strategy in his memoirs, excerpts of which are reprinted in JOEL B. GROSSMAN & RICHARD S. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 448–52 (2d ed. 1980).

[83] My current project involves documenting and evaluating the dramatic shift in the career backgrounds of Supreme Court Justices. The dominant recruitment pool used to be prominent politicians; it is now the federal judiciary.

most certainly would understand that its decisions would require different "handling" than is typically the case. This suggestion is not entirely frivolous; more attention and care on the part of the Court in presenting itself and its decisions might result in greater public awareness and understanding.

Strengthening the Court's capacity to control the manner in which its decisions are communicated to the public could also be directed to the final limitation on the ability of value clarity to have its desired effect: the general inattentiveness of the public. Public opinion research consistently reveals that the public's knowledge about the Court and its decisions is quite limited.[84] (Of course, that lack of knowledge holds true for other government institutions as well.[85]) In most surveys, "only about 40 percent of the American public, at best, follows Supreme Court actions, as measured by survey respondents having either read or heard something about the Court."[86] In a 1989 *Washington Post* poll, nine percent of the public could name the Chief Justice, while twenty-five percent could name Judge Wapner of television's "People's Court" fame.[87] And in surveys taken in 1975 and 1982, approximately sixty percent of Americans did not know, even generally, what the Court had ruled in *Roe v. Wade*.[88] Finally, "in a 1990 survey, '[l]ess than one-fourth of the respondents knew how many justices there are, and nearly two-thirds of them could not name a single member of the Court.'"[89]

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[84] MARSHALL, *supra* note 10, at 142–45; David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405 (1983); Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303 (John B. Gates & Charles A. Johnson eds., 1991) [hereinafter Caldeira, *Courts*]; Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986) [hereinafter Caldeira, *Neither*]; Gregory Casey, *Popular Perceptions of Supreme Court Rulings*, 4 AM. POL. Q. 3 (1976); William J. Daniels, *The Supreme Court and Its Publics*, 37 ALB. L. REV. 632 (1973); Kenneth M. Dolbeare, *The Public Views the Supreme Court*, *in* LAW, POLITICS, AND THE FEDERAL COURTS 194 (Herbert Jacob ed., 1976); John H. Kessel, *Public Perceptions of the Supreme Court*, 10 MIDWEST J. POL. SCI. 167 (1966); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prequisites for Court Legitimation of Regime Change*, 2 L. & SOC'Y REV. 357 (1968).

[85] For example, typically only 35–40% of Americans can correctly name their congressional representative. Richard Morin, *The Ignorant 80s*, WASH. POST, Dec. 24, 1989, at C5 (quoting from The University of Chicago General Social Survey, 1987).

[86] ROSENBERG, *supra* note 80, at 126.

[87] Morin, *supra* note 85, at C5.

[88] ROSENBERG, *supra* note 80, at 236.

[89] STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 357 (4th ed. 1993) (quoting Marcia Coyle, *How Americans View High Court*, NAT'L

Additionally, Thomas Marshall's study found little evidence to support the notion that the Court's decisions affect public opinion. He compared the eighteen Court decisions from 1935 to 1986 in which there was pre- and post-decision poll data. The Court's impact on public opinion was typically small and the "direction" of impact varied. The public shifted in favor of the Court's position in only six of the eighteen instances, away from the Court's position in nine instances and, in three instances, there was no shift at all.[90] Marshall concluded that "Supreme Court decisions seldom greatly influence American public opinion either over the short term or the long term."[91]

Does such evidence sound the death knell for the argument advanced here, that value clarity in opinion writing enhances public debate and serves democratic ends? For several reasons, I think not. For example, methodological difficulties abound in this area, making clear and certain conclusions regarding the relationship between the Court and public opinion quite difficult.[92] Additionally, some studies have provided *contrary* evidence regarding both limited public awareness of the Court's decisions and a limited Court capacity to affect public opinion. For example, Liane Kosaki's 1989 survey of St. Louis residents did not produce the expected *uniformly* low rates of public awareness of Supreme Court decisions. Although only 22.1 percent of the respondents were aware of the Court's "dial-a-porn" decision[93] and 31.5 percent regarding its decision on the death penalty for minors,[94] 71.7 percent were aware of Court action with regard to flag-burning,[95] and 83.5 percent were aware of recent Court activity regarding abortion rights.[96] These findings suggest that "the public is neither universally ignorant nor universally informed about Court decisions."[97]

In a similar vein, some studies have suggested that the Court can in fact affect public opinion. For example, Page, Shapiro, and Dempsey found that federal courts often significantly affected public opinion, though negatively. Their rulings on affirmative action and school desegregation, for example, did

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L.J. 1 (Feb. 26, 1990)).

[90] MARSHALL, *supra* note 10, at 145–47.

[91] *Id.* at 155; *see also* ROSENBERG, *supra* note 80; Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation*, 12 AM. POL. Q. 335 (1984).

[92] *See* Caldeira, *Courts*, *supra* note 84.

[93] Sable Communications, Inc., v. FCC, 492 U.S. 115 (1989).

[94] Stanford v. Kentucky, 492 U.S. 361 (1989).

[95] Texas v. Johnson, 491 U.S. 397 (1989).

[96] Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

[97] Liane C. Kosaki, Public Awareness of Supreme Court Decisions 11 (Aug. 29–Sept. 1, 1991) (paper presented at the Annual Meeting of the American Political Science Association, on file with the *Ohio State Law Journal*).

produce a reaction: increased public opposition.[98] In contrast, Thomas Marshall found that judicial activism and liberal outcomes resulted in greater public support for the Court's position.[99] Caldeira's study of changing public opposition to President Roosevelt's 1937 Court-packing plan revealed that two "Court actions"—its decision to uphold the Wagner Act[100] and the resignation of a powerful New Deal opponent, Justice Van Devanter—succeeded in decreasing support for FDR's plan by almost ten percent.[101]

A study by Franklin and Kosaki regarding the impact of *Roe v. Wade* on public attitudes toward abortion suggests that the Court may influence public opinion, but in unexpected and unintended ways.[102] *Roe* did increase public support for abortion involving "hard" reasons, for example, in the case of fetal defect or when the health of the mother is endangered. However, with regard to public support for discretionary abortions (*i.e.*, for "soft" reasons such as being unmarried, poor, or not wanting more children), *Roe* had the effect of *polarizing* public opinion: increasing the opposition of pro-life advocates and the support of pro-choice advocates, with overall approval changing not at all.[103] Wlezien and Goggin found that despite the lack of change in overall approval, there was growing public support in the 1980s for "current abortion policy." They attributed this trend to media reports that Supreme Court decisions (and Supreme Court nominations) would lead to greater restrictions on abortion access.[104] A study conducted by Mondak found some evidence of the Court's "persuasive force," but only under certain conditions, for example, when the issue lacked personal relevance or when the Court's credibility was substantially greater than other attributed sources (such as high school principals or city police).[105] Finally, Professor Canon's examination of the effectiveness of the Court's "cheerleading" with regard to desegregation and abortion led him to conclude that "the Court can place a politico-moral issue on the national front burner," but has only a "limited ability to guide [it] . . . to

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[98] Benjamin I. Page et al., *What Moves Public Opinion?*, 81 AM. POL. SCI. REV. 23 (1987).

[99] MARSHALL, *supra* note 10; Thomas R. Marshall, *The Supreme Court as an Opinion Leader*, 15 AM. POL. Q. 147 (1987).

[100] NLRB v. Jones and Laughlin Steel, 301 U.S. 1 (1937).

[101] Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1149 (1987).

[102] Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

[103] *Id.* at 759.

[104] Christopher B. Wlezien & Malcolm L. Goggin, *The Courts, Interest Groups, and Public Opinion About Abortion*, 15 POL. BEHAV. 381 (1983).

[105] Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 22 POL. BEHAV. 363 (1990).

consensus or resolution."[106] Of course, this conclusion is quite consistent with the stated goal of the value clarity norm—provoking but not dictating a democratic resolution to a significant public issue.

Certainly, the weight of the evidence is that the public is uninformed and unattentive with regard to Supreme Court decisions. However, the evidence is more mixed, and less methodologically sound, with regard to the impact of Supreme Court decisions on public opinion.

D. *Value Clarity and Judicial Capacity: A Reassessment*

A variety of conditions pose a threat to the ability of the Court both to issue consistently "value clear" opinions and to affect public debate in a significant and positive manner. These conditions include the collegial nature of decisionmaking and opinion writing, the possibility of both weak leadership of and complex ideological divisions within the Court, the limited control over how its decisions are communicated, and the limited public awareness and receptivity to the Court's decisions generally and its opinions more particularly.

However, it should first be noted that such limitations are not discussed in constitutional law scholarship, nor viewed as critical to reconciling judicial review with democratic values. This Article has argued that this lack of attention is an unfortunate oversight. Additionally, such limitations are not insurmountable. Efforts can and should be made to strengthen leadership on the Court, to improve the clear communication of the Court's decisions, and to engage the public more effectively on existing or emerging political issues, particularly their constitutional dimensions.

In any case, these limitations do not constitute adequate reasons for the Court *not* to make the attempt to be clear with regard to the discretionary value choices it is making. For example, despite low levels of public attentiveness generally, research shows that when the Court engages the public, evaluations of the Court's decisions which ensue are based on political agreement or disagreement, rather than reverence for the Court as has often been suggested.[107] These democratic conditions are precisely what should exist for the Court to initiate, and not to foreclose, public debate. The key for the Court, as it is for other political leaders, is breaking through to the public

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[106] Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637, 650, 652 (1992).

[107] Caldeira, *Neither*, *supra* note 84; Casey, *supra* note 84; Kenneth M. Dolbeare & Phillip E. Hammond, *The Political Party Basis of Attitudes Toward the Supreme Court*, 37 PUB. OPINION Q. 16 (1968); Dean Jaros & Robert Roper, *The Supreme Court, Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 85 (1980); Murphy & Tanenhaus, *supra* note 84.

consciousness, which is in turn well-served by value clarity.

Value clarity in the Court's opinions is, thus, a necessary but not sufficient condition for the democratic resolution of political conflict which we desire. Other conditions—the faithful communication of the Court's message and the public's willingness to listen to and to care about the message—must be fulfilled as well.

VII. CONCLUSION

Value clarity in constitutional decisionmaking is an important but overlooked norm for Justices to strive to satisfy and for scholars to employ in their evaluations. In contrast to the legal process approach, the goal of our concern with judicial process and method should not be the negative goal of minimizing judicial discretion. Rather, it should be the positive goal of facilitating a dialogue, promoting a more focused public debate and, thus, bringing the nation closer to a democratic resolution of the important issues of the day. Value clarity can therefore ease the tension between judicial review and democratic principles.

This function of placing before the people clear and meaningful value choices is important in any democracy. However, it is especially important in a country as large and diverse as the United States, with weak political parties and with a government in which power is diffused and fragmented.

Value clarity is certainly not the only criterion by which we can judge the Court. It is nonetheless more consistent with democratic values than other standards typically advanced, such as correspondence with the Framer's intent[108] or the notion, advanced by Judge J. Skelly Wright, that "the ultimate test of a judge's work is goodness."[109] The ultimate test of the Court's work, it has been argued here, is public acceptance, a significant degree of understanding of and support for those constitutional values which the Court has "run through the process" and, thus, to which the people have consented. That democratic end is served by value clarity.

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[108] BORK, *supra* note 6.

[109] J. Skelly Wright, *Professor Bickel, the Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1971).